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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-6949 A-1098

JACOB JOHN DOUGAN, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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JACOB JOHN DOUGAN, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner, Jacob John Dougan, Jr., prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Florida entered on April 9, 1981, rehearing denied, June 4, 1981.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Florida is set out in ____So. 2d___ (Fla. 1981) and is set out in Appendix A; the denial of the motion for rehearing is set out in Appendix B. The unreported order of the Circuit Court of Duval County, Florida is set out in Appendix C.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Florida Statutes and the Florida Rules of Criminal Procedure, the texts of which are set out in Appendix D hereto:

Florida Statutes §782.04 (1)

Florida Statutes §921.141

Florida Statutes §38.23

Florida Statutes §900.04

Florida Rule of Criminal Procedure 3.230

QUESTIONS PRESENTED

-1-

Whether Petitioner's death sentence was imposed in an arbitrary and capricious manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution where the death sentence was based in part on the aggravating circumstances enumerated in Fla. Stat. §921.141 (5) (a&b) and these aggravating circumstances factually did not exist.

-2-

Whether Petitioner's death senctence was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution as detailed in this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), where the trial court

at a resentencing hearing refused to even consider substantial applicable mitigating circumstances presented by Petitioner.

Whether Petitioner was denied his right to a fair resentencing proceeding before a neutral and detached judge, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution where the judge decided the issue of his own disqualification and refused to disqualify himself after the Petitioner had moved to disqualify the judge for bias and prejudice.

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues in the QUESTIONS PRESENTED were raised on appeal to the Supreme Court of Florida which affirmed the rulings of trial court.

STATEMENT OF THE CASE

In March 1975, Petitioner, Jacob Dougan, was convicted of first degree murder[1] and sentenced to death. The judgement and sentence was affirmed by the Supreme Court of Florida. Barclay and Dougan v. State, 343 So. 2d 1266 (Fla. 1977). Certiorari was denied by this Court. Dougan v. Florida, 439 U.S. 892 (1978).

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1. Fla. Stat. §782.04(1)

Pursuant to this Court's decision in Gardner v. Florida, 430 U.S. 349 (1977), the Supreme Court of Florida vacated Petitioner's death sentence and remanded the case to the trial court for a new hearing to provide Petitioner an opportunity to rebut the presentence report in his case. Barclay and Dougan v. State, 362 So. 2d 657 (Fla. 1978).

Prior to the resentencing proceeding, Petitoner, by written motion and written amendment to that motion, moved to disqualify the judge for bias and prejudice (RI53-79; 81-86)[2]; the trial judge refused to disqualify himself (RI 80;87).

The resentencing hearing was conducted on August 21, 22 and 23, 1979. Twenty-six (26) witnesses testified on behalf of Petitioner, Jacob Dougan, at his resentencing hearing. Among these twenty-six witnesses were two attorneys, the Executive Director of the Northeast Florida Community Action Agency, an administrator and planner for the Jacksonville, Florida Area Agency on the Aging, the Staff Director of Jacksonville's Neighborhood Resource Center, a grant writer with the Greater Jacksonville Consultants, Inc., the president of the Jacksonville branch of the N.A.A.C.P., a correctional counselor with the State of Florida Department of Corrections, a high school principal, a Duval County,Florida school teacher, a program developer for Florida Junior College, and other civic

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2. The Record on Appeal in the Supreme Court of Florida of Petitioner's resentencing proceeding is contained in six (6) volumes numbered consecutively I-VI; the Florida Supreme Court later supplemented the record with the addition of the original presentence report. References to this record will be designated "R" followed by the appropriate volume and page number; references to the presentence report will be designated by "PSI" followed by the appropriate page number. References to the record of Petitioner's trial in 1975 will be designated "R Trial" followed by the appropriate volume and page number.

minded members of the Jacksonville, Florida community. (RIII 14,31,40,47,89,96,107,138,139; RIV 58, 63, 95, 139, 140).

Essentially, these witnesses testified to rebut the adverse allegations concerning Jacob Dougan's character contained in the original presentence report in this case.

Jacob Dougan attended high school in the Jacksonville, Florida community; at his high school Petitioner was a student leader and member of the student council. He was also an active participant in the Boy Scouts, earning the coveted rank of Eagle Scout; he displayed all of those positive character traits expected of an Eagle Scout (RIII 139, 140; RIV 79,96,98).

After high school, Jacob Dougan briefly attended college in Tallahassee, Florida; he then joined the United States Air Force where he served his country in the Vietnam War (RIII 127,130).

After he returned from the service in the late 1960's, until his arrest in this case in 1974, Petitioner contributed most of his time to numerous social programs in the Jacksonville area.

Jacob Dougan was actively involved in directing the Meals on Wheels Program, a program set up to provide free hot meals to the low-income elderly and disabled persons of his community. Petitioner personally went to groceries and other businesses in the community to solicit donations of food and clothing for the poor people served by the program; he personally assisted in serving the meals. When an elderly or disabled person served by the Meals on Wheels Program was without transportation to reach the place where the food and clothing was distributed, Petitioner would personally arrange for transportation for that person (RIII 15, 31 52, 65, 76, 121, 122, 128; RIV 122).

Jacob Dougan was also an active participant in the Senior Protection Program, a program established to check with the senior citizens of the neighborhood daily to see that they were okay and were receiving the basic necessities of life (RIII 110).

Petitioner was actively involved in obtaining adequate health care for the low-income people of the Jacksonville, Florida community. He personally recruited volunteer doctors and nurses to provide free health care services at the Neighborhood Health Center on Jacksonville's Eastside (RIII 49-50).

He was one of the founders of the Sickle Cell Anemia Detection Program which was involved in providing screening and medical treatment services as well as community education concerning this dangerous disease. Petitioner was actively involved both in securing volunteer doctors and nurses for the medical services provided by the program and with the community education aspect (RIII 32, 48, 49, 50, 63, 75).

Jacob Dougan was a member of the Board of Directors of Neighborhood Services Program on Jacksonville's Eastside. This was a federally funded program established to assist in running social services programs on a neighborhood level. He was elected to the Board of Directors by the black and white citizens of the community (RIII 40, 42, 54, 90, 97; RIV 64, 140).

Petitioner worked with children and young people in the Jacksonville area. He worked as a coach for Little League teams in the community. He was actively involved with the Sherriff's Department Youth Program which was established to promote a better relationship between young people and the law enforcement agencies in Jacksonville. He helped recruit

children for the local Head Start Program. He donated money to sponsor children so they could attend the Young Life Christian Organization summer camps; he always contributed to help the most needy child. He helped to take children on educational field trips (e.g., trips to the newspaper, food processing plant, etc.). He assisted the director of the Drug Alternative Center with his program. (RIII 63,64,77,78,92,98,119,121,135, 136,137; RIV 141,142).

Jacob Dougan helped low-income kids seek out grants and scholarships for college. At Christmastime, he helped collect toys for Christmas presents for poor children (RIII 53,127).

Jacob Dougan was also involved in various other community programs such as Walnut House, a halfway house for paroled prisoners, the ex-offenders program, urban renewal committee, etc. (RIII 31,40,63,75,91; RIV 65,66,122,141).

Jacob Dougan was never paid for any of his contributions to the community. These programs benefitted both the black and white citizens of the community; Jacob Dougan always worked as a partner with the black and white people of the community and was respected by both. (RIII 17,35,42,54,66,78,98,100, 110, RIV 141,142).

Since his conviction, Petitioner has been an excellent prisoner on death row. He interacts well with both guards and other prisoners, black people and white people. He helps write letters for illiterate death row prisoners (RIV 58-61).

As Petitioner's death row counselor testified:

> "Well, I thought [Petitioner] was a very good [inmate] because in the prison system you don't have a person for every man that's incarcerated and a lot of times those people that are incarcerated, some help out on various -- in various situations and [Petitioner] was one of those that did. He showed -- had a leadership role and it was a positive one."
>
> (R IV 60).

The State presented no evidence to rebut any of the testimony presented by Petitioner. In fact, after Petitioner's first six (6) witnesses had testified, the State conceded that their testimony was true. (R III 82-83).

The trial court resentenced Petitioner to death (RI 122-157). In its lengthy resentencing order, the trial court purported to analyze the applicability of the aggravating and mitigating factors detailed in Fla. Stat. §921.141 (5) and (6).

In its findings of aggravating circumstances, the trial court found, among other factors, that Fla. Stat. §921.141. (5)(a) ["the capital felony was committed by a person under sentence of imprisonment."] and §921.141 (5) (b) ["The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."] existed in Petitioner's case. (RI 145;146). These were factually untrue.

Petitioner has never been convicted of any felony; Petitioner was not under a sentence of imprisonment at the time of the alleged commission of the capital felony. Nowhere in either the trial record or the record of the resentencing proceeding (or anywhere else) is there one word to substantiate these aggravating circumstances.

In its analysis of mitigating circumstances (RI 138-144), the trial court considered only those mitigating factors enumerated in Fla. Stat. §921.141 (6) (a-g). No mitigating factors outside of the statutorily enumerated mitigating factors were considered.

The Supreme Court of Florida affirmed the trial court in all respects. Dougan v. State, ____So. 2d ____ (Fla. 1981) [Appendix A].

REASONS FOR GRANTING THE WRIT

1. PETITIONER'S DEATH SENTENCE WAS IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE DEATH SENTENCE WAS BASED IN PART ON THE AGGRAVATING CIRCUMSTANCES ENUMERATED IN FLA. STAT. §921.141(5)(a and b) AND THESE AGGRAVATING CIRCUMSTANCES FACTUALLY DID NOT EXIST.

". . .[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die. . ." Gregg v. Georgia, 428 U.S. 153, 190 (1976). Petitioner, in his resentencing determination, was denied this right most fundamental to a person facing the ultimate penalty of death.

Under Florida's death penalty statute, the sentencing judge is required to weigh statutory aggravating circumstances [Fla. Stat. §921.141(5)] against any mitigating factors [Fla. Stat. §921.141(6)]. Before the sentence of death may be imposed, the sentencing judge must find that sufficient statutory aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. Fla. Stat. §921.141(3).

This difficult weighing process was blown out of balance by the unbelievably bizarre findings of the judge who resentenced

Petitioner to death.

Among its findings of statutory aggravating circumstances, the resentencing court found that the aggravating circumstances enumerated in Fla. Stat. §921.141(5)(a & b)[3] existed in Petitioner's case.

The Florida Supreme Court has held that Fla. Stat. §921.141 (a) is properly applied to persons in fact imprisoned at the time of the commission of the capital felony, persons on parole at the time of commission of the capital felony, Aldridge v. State, 351 So. 2d 942(Fla. 1977), persons on weekend furlough at the time of the commission of the capital felony, Darden v. State, 329 So. 2d 287 (Fla. 1976), and to escapees, Adams v. State, 341 So. 2d 765 (Fla. 1977). This aggravating circumstance either facially or as applied is in no way applicable to persons without any restraint on liberty at the time of the offense charged.

Petitioner was not under sentence of imprisonment either at the time of the crime's commission or at the time of sentencing; he was not an escapee; he was not on probation, parole or furlough. This aggravating circumstance cannot, under any proper construction, be applied to Petitioner.

Nevertheless, in applying Fla. Stat. §921.141(5)(a), the resentencing court first stated that "Dougan was not under sentence of imprisonment when convicted of this murder," and then paradoxically concluded that the aggravating circumstance existed. (RI 145).

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3. Fla. Stat. §921.141(5)(a): "The capital felony was committed by a person under sentence of imprisonment."; §921.141(5)(b): "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

More unbelievably, the resentencing court found Fla. Stat. §921.141(5)(b) to exist despite the fact that Petitioner had not been previously convicted of any felony, much less the "capital felony" or "felony involving the use or threat of violence to the person" required by the statute.

The resentencing court did not dispute the facts that Petitioner had not been previously convicted of any felony or that Petitioner was not under any sentence of imprisonment at the time of the alleged commission of the capital felony. Rather, the court based its findings of the §(5)(a) and (b) aggravating circumstances solely on two 1971 contempt of court citations.[4] (RI 145, 146).

In Godfrey v. Georgia, 446 U.S. 420, 428 (1980), this Court stated:

> "A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not' [cite omitted].
>
> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."

A state has failed in its responsibility to properly "tailor and apply its law" when a death sentence can be based on factors which do not exist.

Under Florida law, when an improper aggravating circumstance is found, the death penalty will be reversed if any mitigating factors also exist. Elledge v. State, 346 So. 2d 998

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4. There was no evidence concerning these contempt of court citations introduced at either Petitioner's trial or his resentencing hearing; the sole reference in the record to the contempt citations is contained in the Presentence Report. According to the Presentence Report, Petitioner served a total of one day in jail in 1971 for contempt. (PSI at p. 4).

Under Florida law, aggravating circumstances must be proven beyond a reasonable doubt. Alford v. State, 307 So. 2d 433 (Fla. 1975); State v. Dixon, 283 So. 2d 1 (1973). Aggravating circumstances cannot be based solely on information contained in the presentence report. Williams v. State, 386 So. 2d. 538, 542-543 (Fla. 1980).

(Fla. 1977); Menendez v. State, 368 So. 2d 1278(Fla. 1979). The Florida court has also, in one case, vacated a death sentence when improper aggravating circumstances were found, yet no mitigation existed. Williams v. State, supra.

This position is constitutionally required. Since the capital sentencing decision is based on a weighing of aggravating and mitigating factors, [Fla. Stat. §921.141(3)], it cannot be determined to what extent the improper factors affected the balance. Cf. Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965); Stromberg v. California, 183 U.S. 359 (1931).

In Proffit v. Florida, 428 U.S. 242 (1976), this Court relied upon the appellate review in the Supreme Court of Florida to protect against an arbitrary application of the death penalty:

> "The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted' [cite ommited]"
> 428 U.S. at 252-254 (emphasis supplied)
>
> * * * * * * * * *
>
> "If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. These reasons, and the evidence supporting them, are conscientiously reviewed by a court which because of its statewide jurisdiction, can assure consistency, fairness and rationality in the evenhanded operation of the state law."
> 428 U.S. at 259-260.

With a thunderous crash, the Supreme Court of Florida, in Petitioner's case, has dropped its responsibility to "review and reweigh" the aggravating circumstances. The Supreme Court of Florida flatly refused to review the aggravating circumstances found in Petitioner's case.

Apparently, the Florida court's only justification for refusing to conduct this review was that appellate review of the sentence is not required after resentencing pursuant to a Gardner v. Florida, supra remand.[5] Dougan v. State, ___So. 2d___(Fla. 1981) [Appendix A at p. 2-3]. This position is constitutionally invalid.

Petitioner's original death sentence was vacated, Barclay and Dougan v. State, 362 So. 2d 657 (Fla. 1978); therefore, at the time of remand, Petitioner had no death sentence. Petitioner's present death sentence is based on a written sentencing order, analyzing aggravating and mitigating circumstances, issued by the court at the time of resentencing (RI 122-157). As stated in dissent by Justices McDonald and Overton of the Supreme Court of Florida:

> "The original sentence in this cause was vacated. If execution as ordered is to take place, then that execution must be predicated on the last imposed sentence, which must be free from infirmities. Just because it is the same as a prior affirmed sentence does not necessarily make this one correct; it must pass constitutional muster on its own. This sentence does not.
>
> After previously stating that the facts of contempt were unknown, the trial judge wrongfully found that two criminal contempt convictions constituted the aggravating factors of being under a sentence of imprisonment when the murder was committed and conviction of a felony involving the use of threat or violence. Neither is true."
> Dougan v. State, ___So. 2d___(Fla. 1981) [Appendix A at p. 4] (McDonald and Overton, JJ, dissenting)

Petitioner's present sentence of death is based on aggravating factors that do not exist. The Supreme Court of Florida has failed to "assure rationality" in the imposition of this death sentence.

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5. This position is curious since the Supreme Court of Florida has previously held that a Gardner remand is part of the appellate process. Messer v. State, 384 So. 2d 644 (1980).

2. PETITIONER'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS DETAILED IN THIS COURT'S DECISION IN LOCKETT v. OHIO, 438 U.S. 586 (1978), WHERE THE TRIAL COURT AT A RESENTENCE HEARING REFUSED TO EVEN CONSIDER SUBSTANTIAL APPLICABLE MITIGATING CIRCUMSTANCES PRESENTED BY PETITIONER.

In its resentencing order, the trial court's analysis of mitigating circumstances was limited to the mitigating circumstances enumerated in Fla. Stat. §921.141(6) [RI 138-144]. The resentencing court refused to find any of these mitigating circumstances to exist in Petitioner's case.

At least one of these statutory mitigating circumstances Fla. Stat. §921.141(6)(a) ["The defendant has no significant history of prior criminal activity"], clearly applies to Petitioner.[6] The Supreme Court of Florida, in its initial review of Petitioner's death sentence, stated: "Dougan, who was 27 at the time, had no significant history of prior criminal activitiy..." Barclay & Dougan v. State, 343 So. 2d at 1270. No evidence was presented at the resentencing proceeding to rebut this fact.

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6. Fla. Stat. §921.141(6)(g) ["The age of the defendant at the time of the crime"] should also be applicable. This circumstance would not be based Petitioner's youth; Jacob Dougan was 27 at the time of the alleged offense. Rather, in State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), the Supreme Court of Florida held that §921.141(6)(g) was applicable in reviewing, "the length of time that the defendant has obeyed the laws in determining whether of not one explosion of total criminality warrants the extinction of life."

Nevertheless, the resentencing court refused to find this mitigating circumstance. The court's decision was based not on any crime committed by petitioner, but rather: "because the facts of the contempt of court are not known at this time" (RI 139)[7].

Even more egregious than the resentencing court's refusal to find applicable statutory mitigating circumstances, was its refusal to even consider mitigating circumstances not specifically enumerated by the statute.

> ". . .we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."
>
> Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in the original)

The elements of non-statutory mitigation presented by Petitioner at his resentencing hearing have been more fully discussed in the STATEMENT OF THE CASE, supra; they will be only briefly summarized here:

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7. The power of contempt is given to courts to enforce their orders, punish refusals to obey and maintain courtroom decorum. Fla. Stat. §§38.23; 900.04. Nowhere in Florida law is contempt designated as a crime. Indeed, contempt can be cited summarily with no right to trial or right to confront witnesses.

However, even if contempt could be considered a crime, a contempt citation resulting in one day's incarceration could hardly be considered a "significant history" of criminal activity. Interestingly, the Presentence Report does not indicate whether the contempt was civil or criminal contempt. (PSI at p. 4).

Petitioner has built an impressive record of prior good behavior. He was an excellent student and an Eagle Scout (RIII 139, 140; RIV 79, 96, 98).

Petitioner served his country in the United States Air Force during the Vietnam War (RIII 127, 130). The fact that the trial court ignored Petitioner's military service is evidenced by this comment in the sentencing report:

> "Had the defendant been exposed to the carnage of the battlefields... instead of movies, television programs and revolutionary tracts...then perhaps his thoughts and actions would have taken a less violent course." (RI 156).

After he returned from the service, until his arrest in this case, Petitioner contributed much of his time to numerous social programs in the Jacksonville area. His activities included hot meal programs for the elderly and disabled, Senior Protection Program for the elderly, health care programs for the poor, Sickle Cell Anemia Detection Program, Board of Directors of the the Neighborhood Service Program, Little League coach, Sheriff's department Youth Program, Head Start Program, collecting toys for poor children at Christmas, ex-offenders program and many others. (RIII and IV, passim).

Since his conviction, Petitioner has been an excellent inmate on death row, helping both guards and other inmates (RIV 58-61).

The resentencing court refused to even consider any of these positive contributions as possible non-statutory mitigating circumstances.

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human brings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of of the penalty of death."
>
> Woodson v. North Carolina, 428 U.S. 280 at 304 (1976).

The Supreme Court of Florida refused to review applicable mitigating circumstances or the trial court's failure to consider mitigating circumstances. Again, that court's only explanation was that such review was not necessary on appeal of the imposition of the death sentence after the original death sentence had been vacated for Gardner relief.[8] Dougan v. State, ___So. 2d___ (Fla. 1981) [Appendix A at p. 2-3].

Again, this position is constitutionally invalid. Much of the evidence of mitigating factors presented by Petitioner directly rebutted adverse allegations concerning Petitioner's character contained in the confidential section of the Presentence Report.[9]

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8. In contradiction, the Supreme Court of Florida had previously held that the scope of a Gardner remand was to consider both the Presentence Report "as well as other matters properly considered by the trial court concerning appellant's sentence..." Funchess v. State, 367 So. 2d 1007 (Fla. 1979). (emphasis supplied).

9. The confidential section of the Presentence Report alleged that Petitioner was a racist who spent much of his time reading and writing revolutionary political material; that Petitioner instructed young people in revolutionary politics; and other character slurs (PSI, Confidential Section). None of these allegations or character slurs were supported by substantial facts. The Presentence Report discussed none of the applicable mitigating factors.

At the resentencing hearing, the author of the Presentence Report testified that the facts contained in the report were developed almost exclusively from prosecution and police sources. (RIV 131)

As stated by Justices McDonald and Overton of the Supreme Court of Florida in dissent:

> "Besides finding at least two unfounded aggravating factors, the trial judge failed to recognize one statutory mitigating factor[3] [No significant prior criminal activity]. Also, the defendant presented substantial nonstatutory mitigating evidence. This evidence was properly presented and related to information on the defendant's background, which had been addressed in the pretrial [presentence] report. While the trial judge was not required to agree with such evidence, he should at least have considered it and made some reference to it in the weighing process."
>
> Dougan v. State, ___ So. 2d ___ (Fla. 1981) [Appendix A at p. 4-5] (McDonald and Overton, JJ, dissenting).

3. PETITIONER WAS DENIED HIS RIGHT TO A FAIR RESENTENCING PROCEEDING BEFORE A NEUTRAL AND DETACHED JUDGE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE JUDGE DECIDED THE ISSUE OF HIS OWN DISQUALIFICATION AND REFUSED TO DISQUALIFY HIMSELF AFTER THE PETITIONER HAD MOVED TO DISQUALIFY THE JUDGE FOR BIAS AND PREJUDICE.

Prior to the resentencing hearing, Petitioner filed a motion to disqualify Judge R. Hudson Olliff as judge (RI 53-79); Petitioner subsequently amended that motion (RI 81). The motion and amendment thereto were filed in complete compliance with applicable Florida Law. Florida Rule of Criminal Procedure 3.230. The facts in support of the motion were supported by affidavits, the trial record in this case and other matters of public record.

Under the procedure outlined in Fla. R. Crim. P. 3.230, it is the duty of the judge to examine the motion for its legal sufficiency and then to step down. It is not for the judge to adjudicate the issue of his disqualification.

Under Florida law, legal sufficiency is shown if the facts alleged in the motion show a well founded fear on movant's part that he will not receive a fair hearing at the hands of the judge. State ex rel Brown v. Dewell, 179 So. 695 (Fla. 1938).

At the hearing on the motion, the judge refused to step down after an examination of the motion (RII 98). Petitioner's counsel then argued that if the judge would not automatically

step down, then Petitioner should be allowed to present evidence on behalf of the motion to disqualify the judge (RII 89-91; 93-95). The court not only refused to allow the presentation of evidence, he also refused to allow Petitioner's counsel to make an offer of proof of the evidence which could be presented (RII 98-100).

The judge also attempted, from the bench, to refute some of the facts alleged in the motion (RII 96-98).

Judge Olliff decided the issue of his own disqualification and refused to disqualify himself. (RI 80, 87).

Fla. R. Crim. P. 3.230 is substantially similar to the federal procedural standard for disqualification of a judge detailed in 28 U.S.C. §144. Under the federal standard, the judge cannot determine the truth of the allegations made against him; if the facts alleged, if true, would create a fear of bias in the party's mind, the judge must step down. Burger v. United States, 255 U.S. 22, 34-36 (1921).

An analysis of the five (5) grounds alleged in the motion to disqualify and the amendment to that motion will show Petitioner's well-founded fear of bias on the part of the trial judge:

1) The trial judge holds a deep personal bias against Petitioner; this bias extends beyond the fact that the judge had previously sentenced Petitioner to death.

In his original sentencing order in this case (R Trial II 217-247) the judge compared Petitioner with the Nazis of World War II; he deviated from his statutory obligation of considering solely aggravating and mitigating factors to inject his personal experiences and beliefs into the sentence. The judge spoke of the Nazi concentration camps and the atrocities committed in those camps. (R Trial II 219-220).

It is inconceivable that a judge who has compared Petitioner with the Nazis of World War II, the group whose name and actions have become synonomous with the mass murder of millions, genocide and atrocities of the most unthinkable nature could sit fairly and impartially, without preconceptions as to sentence, and determine Petitioner's fate.

Is it reasonable to believe that Petitioner would be without a well founded fear concerning the bias of a man who compares him with Hitler's Nazis?

2) The judge maintains memberships in three (3) organizations which practice racial discrimination against black persons. These three organizations have no black members, do not admit black persons and have never allowed membership to a black person (RI 83-84).

Petitioner, a black person, would certainly have a well founded fear of prejudice on the part of a judge who decides whether he lives or dies and that judge engages in racial discrimination. How can a judge make the difficult and subtle judgments of character required in weighing aggravating and mitigating circumstances when the person standing before him is black and the judge is a person who practices racial discrimination?

Barely a page passes in the resentencing order (RI 122-157) where the trial court does not make reference to the issue of race. The trial judge has made race the focal point of Petitioner's sentence; if this is the major issue, how could the trial court be fair when the trier of fact, in his conscious personal decisions on issues of race, has shown himself to participate in acts of racial discrimination?

3) In both Petitioner's case and other capital cases, the trial judge has engaged in ex parte conversations concerning these cases with attorneys of the State of Florida Attorney General's office.

The trial judge's actions created a fear in Petitioner's mind that the trial judge had developed a pattern of discussing ex parte with representatives of the State issues involved in capital cases pending before him.

Canon 3 of the Code of Judicial Conduct states:

> "(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond."

Even if an ex parte communication takes place it must be with a "disinterested expert." The Office of the Attorney General represents the State of Florida in criminal proceedings. Fla. Stat. §16.01. An Assistant Attorney General can hardly be characterized as disinterested.

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), this Court recognized that a state Attorney General could not be considered neutral and detached in a state criminal prosecution.

Why would the State find it desirable to engage in conversations with the judge without participation by the defense if not to improperly influence the judge? Why would the judge find it desirable to engage in conversations with the State without participation by the defense if not to hide something from the defense?

4) The trial judge, ex parte called an Assistant Attorney General of the State of Florida to ask him to seek review in the United States Supreme Court of the Supreme Court of Florida's decision granting relief pursuant to Gardner v. Florida, supra, in the case of Dobbert v. State (Fla. Sup. Ct. No. 45,558). Petitioner's case was also remanded for Gardner relief.

Not only was this conversation an improper ex parte communication as discussed above, it also shows a prosecutorial attitude on the part of the trial judge concerning Gardner relief. Apparently the trial judge has some disagreement concerning the propriety of Gardner relief.

Certainly, no judge likes to be reversed; however, a judge should be toally disintereseted as to the result of a case as long as the law is followed. It is inconsistent with the concept of an impartial judiciary for a judge to actively seek a specific legal action against a party before him.

If a trial judge's order is vacated, his only interest should be to proceed properly on remand, not to seek further review of the action to the detriment of a party before him.

The trial judge's actions created a well founded fear in Petitioner mind that the trial judge had a prosecutorial attitude towards Gardner relief.

5) The trial judge, by his actions in capital cases tried before him, has shown a biased predisposition towards imposing the death penalty and does not properly conduct the painstaking analysis required by Fla. Stat. §921.141.

The trial judge has sentenced five (5) persons to death: Dobbert v. State (Fla. Sup. Ct. No. 45,558); Carnes v. State, (Fla. Sup. Ct. No. 46,673); Lewis v. State (Fla. Sup. Ct. No. 50,851); Barclay & Dougan v. State (Fla. Sup. Ct. No. 47,260).

Four (4) of these persons had received jury recommendations of life imprisonment:

> ". . .in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."
>
> Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

Compare the following language from the death sentences imposed by the trial judge:

Dobbert

CONCLUSION OF COURT

> "There are sufficient and great aggravating circumstances which exist to justify the sentence of death.
>
> In concluding my findings I would like to point out that my 22 years of legal experience have been almost exclusively in the field of criminal law.
>
> The Judge of this Court has been a defense attorney of criminal cases, a prosecutor for eight and one half years and a Criminal Court Judge and a Circuit Judge-Felony Division for three and one half years. During this 22 years I have defended, prosecuted and held trial of almost every type of serious crime.
>
> During these years of legal experience, I have never known of a more heinous, atrocious and cruel crime than this one.
>
> My experience with the sordid, tragic and violent side of life has not been confined to the courtroom. During World War II, I was a United States Army Paratrooper and served overseas in ground combat. I have had friends blown to bits and have seen death and suffering in every conceivable form.
>
> I am not easily shocked or effected by tragedy or cruelty-but this murder of a helpless, defenseless and innocent child is the most cruel, atrocious and heinous crime I have ever personally known of-and it is deserving of no sentence but death."
>
> Sentencing order at pp. 19-20.

Carnes

"My 22 years of legal experience have been almost exclusively in the field of Criminal law. I have been a defense attorney in criminal cases, an Advisor to the Public Defender's Office on major crimes, A Prosecutor ror eight and one half years and a Criminal Court Judge and Circuit Court Judge-Felony Division-for almost four years. During these 22 years I have defended, prosecuted and held trial in almost every type of serious crime.

Because of this extensive experience I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.

My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. During World War II, I was a United States Army Paratrooper and served overseas in ground combat. I have seen frieneds blown to bits and have seen death and suffering in almost every conceivable form.

I am not easily shocked or moved by tragedy-but this was an especially shocking crime. The defendant took the life of another human being by a murder that was heinous, atrocious and cruel-and he deserves to forfeit his life."

Sentencing order at pp. 15-16.

Lewis

"In concluding my findings I would like to point out that my 24 years of legal experience have been almost exclusively in the field of criminal law.

The Judge of this Court has been a defense attorney of criminal cases, a prosecutor for eight and one half years, and Advisor to the Public Defender's Office and a Criminal Court and Circuit Court Judge-Felony Division-for 6 years. That during this 24 years I have defended, prosecuted and held trial of almost every type of serious crime.

My experience with the sordid, tragic and violent side of life has not been confined to the courtroom. During World War II, I was a United States Army Paratrooper and served in ground combat in Europe. I have seen death and suffering in almost every conceivable form.

I am not easily shocked or affected by tragedy or cruelty-but this is an especially heinous, atrocious and cruel crime-and is deserving of no sentence but death."

Sentencing order at p. 16.

> "My 23 years of legal experience have been almost exclusively in the field of Criminal Law. I have been a defense attorney in criminal cases, an Advisor to the Public Defender's Office, a prosecutor for eight and one half years and a Criminal Court and Circuit Court Judge-Felony Division-for almost four and one half years. During these 23 years I have defended, prosecuted and held trial in almost every type of serious crime.
>
> Because of this extensive experience I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.
>
> My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. I, like so many American Combat Soldiers, walked the battle fields of Europe and saw the thousands of dead American and German soldiers and I witnessed the concentration camps where innocent civilians and children were murdered in a war of racial discrimination. . .
>
> Having set forth my personal experiences above it is understandable that I am not easily shocked or moved by tragedy-but this present murder and call for racial war is especially shocking and meet every definition of heinous, atrocious and cruel. The perpetrators thereby forfeit further right to life-for certainly their lives are no more sacred than that of their innocent eighteen year old victim, Stephen Anthony Orlando."
>
> (R Trial II 245-246)

This type of photocopy sentencing does not comport with the guided discretion approved by this Court in Proffit v. Florida, supra.

That the trial judge considers the death penalty the only proper punishment for murder is illustrated by his statement in the Lewis sentence:

> "The sanctity of life is revered by all thinking men-yet can it be said that the life of a convicted murderer is more precious than that of the murder victim? Obviously not, and therefore, the maximum penalty of death must be imposed."
>
> Sentencing order at pp. 17-18.

Although at least some of the grounds forwarded by Petitioner in support of the disqualification of the judge were arguably judicial rather than extra-judicial acts, judicial acts should serve as the basis of disqualification where such bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party. E.g., Davis v. Board of School Cm'rs of Mobile County, 517 F. 2d 1044 (5th Cir. 1975). Such a case exists here.

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Florida.

Respectfully submitted,

Joseph M. Nursey
Pamela L. J. Arapgno
Millard C. Farmer
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ATTORNEYS FOR PETITIONER

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CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party, Mr. David Gauldin, Assistant Attorney General, State of Florida, The Capitol, Tallahasseee, Florida 32301, with three (3) copies of the foregoing Petition for Writ of Certiorari and the Appendix thereto by placing same in the United States Mail with adequate first-class postage attached.

This 1st day of July, 1981.

Joseph M. Nursey
ATTORNEY FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-6949

JACOB JOHN DOUGAN, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Supreme Court of Florida

No. 47,260

JACOB JOHN DOUGAN, JR., Appellant,

vs.

STATE OF FLORIDA, Appellee.

[April 9, 1981]

PER CURIAM.

Jacob Dougan was convicted of first degree murder and sentenced to death in a trial proceeding which we affirmed on direct appeal. Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978). At approximately the same time that our decision was rendered in that case, the United States Supreme Court released its opinion in Gardner v. Florida, 430 U.S. 349 (1977), holding that it is a denial of due process for the death sentence to be imposed when the trial judge, in weighing the aggravating and mitigating circumstances of the case, considers information which the defendant had no opportunity to deny or explain.

In order to provide for all persons whose sentences of death had been approved by this Court the protections which Gardner required, and to provide for a uniform procedure to hear applications for relief filed in reliance on Gardner, we entered so-called "Gardner relief orders" for all affected individuals. After one such order was entered for Dougan, we vacated Dougan's sentence and remanded for resentencing, Barclay v. State, 362 So.2d 657 (Fla. 1978), because the record and response of the

trial judge did not clearly indicate that Dougan's counsel had a meaningful opportunity to be heard on any of the matters contained in the pre-sentence investigation report which the trial judge had considered in his original sentencing order. In taking that action, we expressly remanded the case for a new hearing "at which the defense [would have] the opportunity to rebut any of the information contained in the pre-sentence investigation reports . . . ." Id. at 658. Our directive was quite clear that this Court would review a reimposition of the death penalty, "limited to matters related to the compliance with this order." Id.

The trial judge who originally sentenced Dougan conducted a three-day hearing at which Dougan's attorney produced twenty-six character witnesses and made a number of motions. All motions were denied by the trial judge, and at the conclusion of the hearing a new death sentence was imposed. The case is now back in this Court to review that sentence of death. On the basis of a close review of the transcript of the three-day hearing and all other matters submitted to the Court in conjunction with the appeal now pending, we are satisfied that the trial judge's new sentence of death is appropriate.

Counsel for Dougan filed multiple motions during the course of the Gardner remand proceeding, not one of which was directed to the mandate we had issued. Treating the remand as an opportunity to revisit the constitutionality of the death penalty, the bias of the trial judge, the impropriety of articulated aggravating circumstances found in the original sentencing order, and a range of other matters unrelated to our directive, Dougan's counsel endeavored to treat the remand as a full-blown sentencing proceeding. The trial judge properly rejected counsel's attempt to expand the proceeding.

Appendix A., p. 2

Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979).[1]

Our vacation of Dougan's death sentence for Gardner relief was technically-based, serving the sole purpose of allowing Dougan's counsel to demonstrate that matters contained in the pre-sentence investigation report were improper and prejudicial. Dougan has now had that opportunity, and from the record he has failed to show that any information contained in the pre-sentence investigation report was in any way erroneous, misleading or prejudicial.

We now hold that Dougan was not prejudiced by the trial court's early consideration of a pre-sentence investigation report which his counsel originally had no opportunity to rebut, that the original findings of the trial court were not tainted or otherwise rendered invalid by the pre-sentence investigation report, and that the reimposition of a death penalty was proper. We affirm the sentence imposed by the trial judge.[2]

It is so ordered.

ADKINS, ACTING C.J., BOYD, ENGLAND and ALDERMAN, JJ., Concur
McDONALD, J., Dissents with an opinion with which OVERTON, J., Concurs

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

---

1. See also Funchess v. State, No. 47,828 (Fla. April 2, 1981)(trial court on remand for Gardner relief properly refused to provide an entirely new sentencing proceeding in which a new advisory jury could be reconvened).

2. Our disposition of this proceeding in accordance with the limitations imposed at the time we remanded this proceeding to the trial judge makes unnecessary any consideration of multiple challenges which Dougan raises to the proceeding below, to the imposition of the death penalty, to the motion denials by the trial judge, and to the absence of a resentencing jury. That the disposition of these matters is unnecessary to this proceeding does not mean that we have not reviewed or considered the arguments presented by Dougan's counsel in this appeal. We have, and the fact is that each argument presented by Dougan's counsel is fully, adequately and accurately refuted or rebutted by the contrary contentions made in appellee's brief.

Appendix A, p.3

McDONALD, J. dissenting

I dissent. The original sentence in this cause was vacated. If execution as ordered is to take place, then that execution must be predicated on the last-imposed sentence, which must be free from infirmities. Just because it is the same as a prior affirmed sentence does not necessarily make this one correct; it must pass constitutional muster on its own. This sentence does not.

After previously stating that the facts of contempt were unknown, the trial judge wrongfully found that two criminal contempt convictions constituted the aggravating factors of being under a sentence of imprisonment when the murder was committed and conviction of a felony involving the use of threat or violence. Neither is true.[1] The judge also improperly found that in committing the murder the defendant knowingly created a great risk of death to many persons. There was evidence that the defendant may have sought other victims when he perpetrated this murder, but the murder endangered no one but the victim. The test set out in Kampff v. State, 371 So.2d 1007 (Fla. 1979), is not met. I also disagree with the apparent prior conclusion of this Court that anything supports the trial judge's finding that the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law[2] because I don't believe the legislature intended for that aggravating factor to apply to the circumstances of this case. Evidence supports only two of the court's findings: that the murder was committed during a kidnapping and that the murder was heinous, atrocious and cruel.

Besides finding at least two unfounded aggravating factors, the trial judge failed to recognize one statutory mitigating factor.[3] Also, the defendant presented substantial nonstatutory mitigating evidence. This evidence was properly presented and related to information on the defendant's

---

[1] See Barclay v. State, 343 So.2d 1266, 1271 n. 3 (Fla. 1977).

[2] Id. n. 5.

[3] No significant prior criminal activity.

Appendix A, p.4

background, which had been addressed in the pretrial report. While the trial judge was not required to agree with such evidence, he should at least have considered it and made some reference to it in the weighing process.

I would remand this cause for a new sentencing proceeding.

OVERTON, J., Concurs

Appendix A., p.5

An Appeal from the Circuit Court in and for Duval County,

R. Hudson Olliff, Judge - Case No. 74-4139 CF

Joseph M. Nursey, Atlanta, Georgia,

for Appellant

Jim Smith, Attorney General, Wallace E. Allbritton and David P. Gauldin, Assistant Attorney Generals, Tallahassee, Florida,

for Appellee

Appendix A., p.6

IN THE SUPREME COURT OF FLORIDA

THURSDAY, JUNE 4, 1981

JACOB JOHN DOUGAN, JR.,	**	
Appellant,	**	CASE NO. 47,260
vs.	**	Circuit Court Case No. 74-4139
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

ADKINS, ACTING C.J., BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., Concur
McDONALD, J., Dissents

The Motion to Stay Issuance of Mandate filed by attorney for appellant is granted and proceedings in this Court and in the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida, are hereby stayed to and including July 6, 1981, to allow appellant to seek review in the United States Supreme Court and to obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

C
cc: Hon. S. Morgan Slaughter, Clerk
Hon. R. Hudson Olliff, Judge

Joseph M. Nursey, Esquire
Wallace E. Allbritton, Esquire
David P. Gauldin, Esquire

Appendix B

4990 PG 743
ICIAL RECORDS

FILED
OCT 25 1979
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 74-4139 DIV.S

STATE OF FLORIDA

V.

JACOB JOHN DOUGAN

SENTENCE OF JACOB JOHN DOUGAN

OCTOBER 25, 1979

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Appendix C

SUMMARY OF PROCEEDINGS

That because there has been a lapse of over four and one half years since this trial court originally imposed sentence upon this defendant - it may be well to summarize the facts from indictment to the date hereof - for the benefit of review by the Florida Supreme Court.

1. The defendants, JACOB JOHN DOUGAN, ELWOOD CLARK BARCLAY, DWYNE CRITTENDON, and BRAD W. EVANS, were all indicted September 26, 1974, for murder in the first degree in case 74-4139, as follows:

"IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, SPRING TERM, ONE THOUSAND NINE HUNDRED AND SEVENTY-FOUR

STATE OF FLORIDA

vs.

JACOB JOHN DOUGAN, JR., ELWOOD CLARK BARCLAY, DWYNE CRITTENDON and BRAD W. EVANS

INDICTMENT FOR

MURDER IN THE FIRST DEGREE

74-4139

IN THE NAME OF AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that JACOB JOHN DOUGAN, JR., ELWOOD CLARK BARCLAY, DWYNE CRITTENDON and BRAD W. EVANS, on the 17th day of June, One Thousand Nine Hundred and Seventy-Four, in the County of Duval and the County of St. Johns, State of Florida, unlawfully and from a premeditated design to effect the death

Appendix C p.1

of Steven Anthony Orlando, did kill the said Steven Anthony Orlando, by shooting him to death with a pistol, contrary to the provisions of Section 782.04, Florida Statutes."

2. The defendants, JACOB JOHN DOUGAN, DUYNE CRITTENDON, BRAD W. EVANS, AND WILLIAM HEARN, were all indicted September 26, 1974, for murder in the first degree in case 74-4140, as follows:

"IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, SPRING TERM, ONE THOUSAND NINE HUNDRED AND SEVENTY-FOUR

STATE OF FLORIDA
vs.
JACOB JOHN DOUGAN, JR., DUYNE CRITTENDON, BRAD W. EVANS, and WILLIAM HEARN

INDICTMENT FOR MURDER IN THE FIRST DEGREE
74-4140

IN THE NAME OF AND BY THE AUTHORITY OF THE STATE OF FLORIDA:
The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and take presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that JACOB JOHN DOUGAN, JR., DUYNE CRITTENDON, BRAD W. EVANS and WILLIAM HEARN, on the 22nd day of June, One Thousand Nine Hundred and Seventy-Four, in the County of Duval, State of Florida, unlawfully and from a premeditated design to effect the death of Stephen Lamont Roberts, did kill the said Stephen Lamont Roberts, by stabbing him to death with a knife, contrary to the provisions of Section 782.04, Florida Statutes."

3. The defendants, Dougan, Barclay, Crittendon and Evans were tried by jury in case 74-4139 and convicted on March 3, 1975, as follows:

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Dougan - guilty of murder in the first degree

Barclay - guilty of murder in the first degree

Crittendon - guilty of murder in the second degree

Evans - guilty of murder in the second degree

4. The jury - in its advisory sentence - recommended death for defendant Dougan by a vote of ten to two.

5. The jury - in its advisory sentence - recommended life imprisonment for Barclay by a vote of seven to five.

6. That the defendants, Crittendon and Evans, were sentenced by this Court to one hundred and ninety-nine years in the Florida State Prison in case 74-4139. The defendants, Crittendon and Evans, also pleaded guilty in case 74-4140 and were sentenced by this Court for that case also. That subsequently the conviction and sentence of Crittendon was affirmed. (See 388 So.2d 1088.) Evans did not pursue appeal.

7. William Hearn, who was a defendant in case 74-4140 only - testified for the state against Dougan, Barclay, Crittendon and Evans in case 74-4139. Subsequently, Hearn entered into a negotiated plea and sentence with the state in case 74-4140 and was sentenced to fifteen years State Prison.

8. This Court sentenced both Dougan and Barclay to death in case 74-4139 on April 10, 1975.

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9. That subsequent to such sentence, the state entered a nolle prosequi as to Dougan in murder indictment 74-4140.

10. The Florida Supreme Court affirmed the conviction and sentence of both defendants, Dougan and Barclay, on March 17, 1977. (See 343 So.2d 1266.)

11. That on September 7, 1978, the Florida Supreme Court vacated the death sentences and ordered this Court to provide a hearing at which the defendants would have an opportunity to rebut any information contained in the presentence investigation report - including any confidential or other parts thereof - as provided in the case of Gardner v. Florida, 430 U.S. 349. (See 362 So.2d 657.)

12. The United States Supreme Court denied defendants, Dougan and Barclay, certiorari on October 10, 1978. (See 99 Supreme Court Reporter 249.)

13. That after the case was remanded to this Judge in September of 1978, Mr. Ernest Jackson, attorney for both defendants, Dougan and Barclay, was granted a number of continuances due to his terminal illness - and eventually he withdrew from representation of defendants.

14. This Court then appointed two private attorneys, Mr. Randolph Fallin and Mr. Kenneth Vickers, to represent defendants. That both Mr. Vickers and Mr. Fallin have wide experience in criminal practice and with particular skill in capital cases.

15. That several more continuances were granted defendants while Mr. Fallin and Mr. Vickers represented them.

Appendix C p. 4

16. That eventually the defendant, Dougan, retained Mr. Joseph Nursey of the Team Defense Project, Inc., of Atlanta, Georgia, and Mr. Fallin withdrew - thereby necessitating another continuance for the defendant, Dougan.

17. Thereafter Mr. Nursey filed numerous motions, to wit:

A. Motion to Declare Unconstitutional the Florida Death Penalty Statute.

B. Motion for De Novo Sentencing Before a Jury.

C. Motion to Exclude Electronic Media Devices from Courtroom.

D. Motion for Life Sentence.

E. Motion to Disqualify Judge.

F. Motion for Defendant Dougan to Appear as Co-counsel.

G. Motion to Sever.

H. Motion for Funds for Expert Witnesses.

I. Motion for Updated Presentence Report.

J. Petition for Writ of Habeas Ad Testificandum.

K. Several motions for continuance.

Appendix C p 5

That some of said motions and procedures sought by defendant, Mr. Dougan, and his attorney, Mr. Nursey, were obviously beyond the scope and intent of the Florida Supreme Court's Gardner relief order; however, this Court heard and ruled upon each such motion - as evidenced by the Court file herein.

That the defendant, Dougan, responded to the Presentence Report during the week of August 20-24, 1979, and thereafter this case was set for sentence during the week of October 22-26, 1979.

Through an abundance of caution this Court had granted all but one of the motions for continuance filed by defendant, Dougan, and his attorneys. That the pleadings, proceedings and orders herein reveal that the defendant, Dougan, was given at least seven continuances. The last motion for continuance was filed the week of sentence and was denied for the reasons that it was frivolous, without merit and for the further reason that after one year of proceedings, hearings and delays - this case was overdue for sentence.

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EXPLANATION

In the sentence of April 10, 1975, this Court sentenced both the defendants, Dougan and Barclay, in one written sentence.

During the Gardner relief proceedings, both defendants made motion for - and were granted - a severance so that their responses to PSI and sentences would be separate and apart from one another.

That, accordingly, this Court hereby sentences each separately. However, because both were involved in and convicted of the same crime and their participation was so entwined - one with the other - that a thorough and complete sentence cannot be imposed on either without occasional reference to the other.

Appendix C p. 7

COMMENTS OF JUDGE

This present case is one of the rarest types of crimes to come before this Court or any Court. The facts at trial proved that it was a PREMEDITATED - RACIAL - HATRED MURDER. The hapless victim was chosen at random, stalked and brutally murdered ONLY because he was defenseless and because he was of a DIFFERENT racial group than his murderers.

After the crime, tapes were made by the murderers wherein they described the killing and the agony of the victim. These boastful tapes were cruelly mailed to the mother of the murdered boy and to local T.V. and radio stations - bragging of the murder and announcing that it was the start of a revolution and promised further violence. One part of the tapes said "White people prepare yourself to die". It was a call for, and an attempt to start a racial war.

Such ravings could only be from a depraved homicidal mind.

Similar sentiments were violently uttered on another continent in our own recent history. During World War II, when I was about nineteen years old, I was among some of the first American Combat Parachute Infantry Soldiers to enter Nazi Germany, and I was present at the liberation of several slave labor and concentration camps. Particularly, the concentration camps made a vivid and lasting impression upon me. I saw human corpses stacked like cord wood - to be buried or burned in the ovens.

Those people had been murdered in various ways, by starvation, torture, gassing or they were shot. They were murdered because they were all guilty of the same crime - they were different from

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the people who murdered them. They were either of a different race, culture, religion or political belief. That was their only crime - they were different. Surely we must have learned some lasting lesson from that tragic holocaust.

The law does not require that we like each other - nor is it illegal to have prejudices - but it is unlawful to do injury to another person because of that hate and prejudice.

This type of random, racial - hate murder, is almost impossible to believe. Animals hunt and kill for food and, in time of war, men kill in self defense those who would kill them. But, to premeditatedly pick a victim at random - a person not even known to his murderers - and who was chosen for death only because he was guilty of being of a different race - is heinous, atrocious, cruel and an unthinkable crime. The crime itself was horrible, but the attempt to incite racial war and a mass bloodletting - compounded the heinous quality of the murder.

We do not have to like each other - but we must respect the rights of others and we must either live together - or surely we will die together.

Jacksonville and, indeed, the nation has made great progress in race relations and understanding over the last few years. But you, who have committed this racial - hatred murder, have done more to disrupt those good relations and progress than any other one factor in recent time.

You have done a gross disservice to both the black and white citizens of this City. You have given fuel to those who want to think the worst of the people of your race - and you have caused

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consternation and disgust amongst both blacks and whites of good will who are most anxious to help us achieve a society of equality.

Until your arrest - terror stalked the streets of this City - and it was only due to the good will of both our black and white citizens that order prevailed and further violence and retaliatory acts were not committed.

Nothing good has, or ever will, come from the murder of Stephen Anthony Orlando, but the tragic slaughter of this eighteen year old youth can be used as an example of the monumental stupidity of racial - hatred murder.

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VOL 4000 PG 134
OFFICIAL RECORDS

OUTLINE OF THE ESSENTIAL FACTS

The essential facts as brought out in the trial and by the evidence were that the four defendants were part of a group that termed itself the "BLACK LIBERATION ARMY" (BLA), and whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war.

The testimony shows that on the evening of June 17, 1974, Dougan, Barclay, Crittendon, Evans and Hearn set out in a car armed with a twenty-two caliber pistol and a knife with the intent to kill a "devil". The devil being any white person that they came upon under such advantageous circumstances that they could murder him, her or them.

That as they drove around the City of Jacksonville they made several stops and observed a number of white persons as possible victims, but decided that the circumstances were not advantageous and that they might be observed or thwarted in their evil purpose by possible witnesses. At one stop, Dougan wrote out a note - which was to be placed on the body of the victim ultimately chosen for death.

Eventually the five men headed for Jacksonville Beach where they picked up a hitchhiker, eighteen year old Stephen Anthony Orlando. Against his will and over his protest they drove him to an isolated trash dump, ordered him out of the car, threw him down and Barclay repeatedly stabbed him with a knife. Dougan then put his foot on Orlando's head and shot him twice - once in the cheek and once in the ear - killing him instantly. Crittendon and Evans played a lesser degree in the murder and were thus convicted of murder in the second degree.

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The evidence showed that none of the defendants knew or had ever seen Orlando before they murdered him. The note, which Dougan had previously written, was stuck to Orlando's body by the knife of the murderers. The note read:

> "Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people."

Early the following morning the dead body of Stephen Anthony Orlando was discovered - police were called to the scene and the knife and note were preserved for evidence and photos were taken of the dead body and surrounding area. An F.B.I. document and handwriting expert compared the death note with other handwriting of Dougan and testified that they were both written by the same person.

Subsequent to the murder - the defendants, Barclay and Dougan, by their own admission, and supported by the testimony of state's witnesses, made a number of tape recordings concerning the murder. These recordings were mailed to the mother of Stephen Anthony Orlando and to radio and television stations. All of the tapes contained much the same in content and intent. The following two pages are excerpts of several tapes which were typical of all - as follows:

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"Stephen A. Orlando was not murdered, by no means. He was given a fair trial, the same type of fair trial that you gave black people, those same black people who occupy 25 per cent of the American population and 75 per cent of the American prison population. He was tried and found guilty and was executed . . ."

"If you want to know how to spell "Americans", just spell it with three Ks instead of one C, you know, like in Ku Klux Klan. You know white people, you can't do right; your nature is evil. But you gonna pay anyway so that black man's freedom must be gotten no matter what it takes. We can't depend on you for our freedom. We tried that once. You freed us with good ole Abe. He gave us the Emancipation Proclamation. That was the first time we were free. Then we dreamed a little longer, suffered a whole lot more, until you decided 'I'm gonna free those niggers again.' Then you gave us the Civil Rights Bill. How many times do you have to free a people before they are free? You know, like, once you freed us, twice you freed us. The third time you might free us for good, just wipe us out like you're trying to do our race as it is, pushing genocide off on black women, trying to eliminate our race, pushing those jive pills off on them. You don't force that off into your urban white, lily white neighborhoods . . ."

"Mary Ann Mallory [Orlando's mother], don't feel so bad. You haven't lost a son; you got a hero. Your son will go down in black history. He'll be enshrined when black people get their freedom . . ."

"You take advantage of us. You oppress us in our black ghettos, then when we rebel, then you come in with your tanks and your National Guards and you spray black people with all that tear gas and you just take advantage of black people . . ."

"We're tired, white man. We're tired of being hassled, pushed around, told what to do and then having to send our kids to school with you and your funky white offspring, those things, those stringy-haired things you call your kids. . ."

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"You see, you white devil, our minds are far superior to that of a white man due to the fact that you have a six-ounce brain and the black man has a seven-and-a-half ounce brain . . ."

"The reason Stephen was only shot twice in the head was because we had a five pistol. It only shot twice and then it jammed; you can tell it must have been made in America because it wasn't worth a shit. He was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes . . ."

"He died in style, though, begging, begging and pleading for mercy, just as black people did when you took them and hung them to the trees, burned their houses down, threw bombs in the same church that practices the same religion that you forced on these people, my people.. ."

"We are everywhere; you cannot hide from us. You have told your people to get off the streets and to stay home. That will not help, for one night they will come home and we will be there waiting. It has been said, look for us and you cannot see us; listen for us and you cannot hear us; feel for us and you cannot touch us. These are the characteristics of an urban guerilla."

All of the tapes ended with the words "Signed, Your Black Liberation Army".

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William Hearn, one of the five persons present at the murder of Orlando, testified that he witnessed the murder and told of the participation of Barclay, Dougan, Evans and Crittendon - and he together with witnesses James Mattison, Edred Black, and Otis Boss, Jr., stated that they were present when the boastful tapes were made and they identified the voices of Dougan and Barclay when the tapes were played to the jury.

In defense, Dougan denied the murder and the death note - but admitted he made the tapes based on newspaper accounts of the crime. He said that the purpose of the tapes was to dramatize the plight of black people. Barclay admitted making the tapes for the same political reasons - but denied any participation in the murder. Each defendant had alibis as to his whereabouts at the time of the murder, but the jury found them all guilty of murder.

The jury found both Barclay and Dougan guilty of murder in the first degree and in its advisory sentence the jury recommended death for Dougan by a vote of ten to two. In its advisory sentence the jury recommended life imprisonment for Barclay by a seven to five vote.

That thereafter this Court denied motions for a new trial and adjudged each guilty of murder in the first degree.

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Before imposing the sentence for Murder in the First Degree, this Judge has considered those matters brought out by the defendant, Mr. Dougan, in his responses to the PSI. The Court has also closely examined and written its findings as to each of the elements of aggravation and/or mitigation which are set forth in the Florida Statutes and which were guidelines for the jury in considering its advisory sentences.

The Court has summarized the facts as brought out in the trial, in the presentence reports, in defendant's responses to the presentence reports and has applied them to each element of aggravation and mitigation where applicable.

The elements of Aggravation and Mitigation have been summarized below in reverse order.

SUMMARIZATION OF MITIGATION

ELEMENTS

A. WHETHER DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

FACT:

The defendant, Dougan, has a record showing one traffic related offense and two convictions for contempt of court. His rap sheet also shows that he was charged with another murder (74-4140) in which the state entered a nolle prosequi after this Court sentenced him to death in April, 1975.

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CONCLUSION:

There is neither an aggravating or mitigating circumstance as to the defendant Dougan because the facts of the contempt of court are not known at this time. The additional murder charge cannot be considered because it was not prossed after this Court's death sentence in April, 1975.

B. WHETHER THE MURDER WAS COMMITTED WHILE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

FACT:

That Dougan had no claim or defense of insanity or emotional instability. He had an alibi for the time of the crime and proclaimed his innocence. Nor was there any evidence from the PSI that he suffered emotional disturbances in the past or at the time of trial.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there is no evidence of extreme mental or emotional disturbance in the past, at the time of the murder - or at the time of trial.

C. WHETHER THE VICTIM WAS A PARTICIPANT IN THE CONDUCT OF THE DEFENDANT OR CONSENTED TO THE ACT.

FACT:

The defendant Dougan, together with Barclay, Crittendon and Evans, had already decided upon a course of homicide and were looking for a victim when they spotted Stephen Anthony Orlando

and offered him a ride. There was evidence and testimony that the victim urged they take him to a house - so that he could get out and away from his abductors. Instead, he was taken to a trash dump and there the unarmed youth was ordered out of the car - knocked to the ground - stabbed repeatedly by Barclay and shot by Dougan.

CONCLUSION:

There is no mitigating circumstance under this paragraph because the defendant Dougan and the others intended to kill Orlando at the time he got into the car. Orlando could not, and would not, in any way, consent to his own murder, and in fact, he begged for mercy - all in vain.

D. WHETHER DEFENDANT WAS AN ACCOMPLICE IN THE MURDER COMMITTED BY ANOTHER PERSON, AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR.

FACT:

The participation by Crittendon and Evans was lesser in degree and they have been adjudged guilty of murder in the second degree.

FACT:

Both Dougan and Barclay were the major and primary participants in the murder. The evidence shown that Barclay was the first to demonstrate homicidal intent by throwing the victim to the ground and repeatedly stabbing

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him with a knife - as Orlando pleaded for his life. Then Dougan rendered the Coup De Grace by shooting the victim twice in the head.

A close attention to Barclay's boastful remarks on the tapes will lead any listener to conclude that he was a major participant and proud of that participation. Had Dougan been the only major participant - then perhaps Orlando, who was struggling for his life, might have been able to escape. But Barclay and Dougan acting in concert overpowered, stabbed and shot their common prey.

FACT:

Dougan, as shown by the evidence, was the originator and leading force in the idea and he wrote the note and shot the victim after Barclay repeatedly stabbed him - but it was th[illegible] two of them who were the primary culprits. The lesser participants being Crittendon and Evans - which fact was recognized by the jury finding Dougan and Barclay guilty of Murder in the First Degree and the others guilty of Second Degree Murder.

CONCLUSION:

There is no mitigating circumstance under this paragraph as to Dougan - who was the instigator of and a major participant in the murder while acting in concert with Barclay.

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E. WHETHER DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

FACT:

Never, at any time, in any way, was it shown that Dougan acted under duress of any kind. It is apparent from the evidence at trial and the demeanor of the defendants that Dougan was a personality of some degree - and was strong, eloquent and persuasive with the other defendants. Dougan, as the evidence showed, was certainly not under the dominance of any other person, but it is evident from all that occurred at the murder scene that both Dougan and Barclay committed a foul and dastardly murder with each vying to outdo the other in homicidal ferocity.

FACT:

That at the responses to the presentence report, approximately twenty-six persons spoke in behalf of Dougan. The consistent theme of their testimony was that he was active in a number of organizations in leadership capacity; that he was a doer, a mover and a leader.

CONCLUSION:

There is no mitigating circumstance as to the defendant under this paragraph.

F. WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

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FACT:

There was never any suggestion or claim of insanity or any showing, by any evidence, that Dougan did not appreciate the criminality of his acts or that he could not conform his conduct to the requirements of the law. The evidence showed that upon setting out on a homicidal course that there was ample opportunity for Dougan - the instigator - to withdraw from the plot, but he and the others calculatedly and premeditatedly stalked their victim and produced his death - knowing the full consequences thereof.

That the testimony of persons in behalf of Dougan at the responses to presentence report in August, 79, was that he had a keen understanding of right and wrong and social justice. He had been an Eagle Scout and planned policy for several organizations. Of all the defendants he, Dougan, had the full capacity to appreciate the criminality of his conduct and to conform it to the requirements of the law. That his culpability in this murder is enhanced by his appreciation of those requirements - and his total abandonment of them.

FACT:

His capacity to appreciate the criminality of his acts or to conform to the law was not impaired. No incapacity was apparent except an immense ego which led him and the other defendants to believe they would not be discovered and brought to tasks for their deed.

OBITER DICTUM:

If an inflated ego and a highly unrealistic and undeserved belief in his cleverness

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and infallibility would make him not appreciate the criminality of his conduct or substantially impair his ability to adhere to the right - then any person with a similar state of mind would be given carte blanche to decimate that portion of the population against whom he had a real or imagined grievance.

CONCLUSION:
There is no mitigating circumstance under this paragraph as to Dougan.

G. THE AGE OF DEFENDANT AT THE TIME OF THE CRIME.

FACT:
The defendant Dougan was twenty-seven years of age, had completed senior high school and had served in the military. He held various jobs - including that of a karate instructor. He had been married, fathered two children, and was divorced. He was in good health, stood five feet ten inches tall weighing one hundred and forty-five pounds. He was nine years older and larger than his eighteen year old victim.

CONCLUSION:
There is no mitigating circumstance as to defendant under this paragraph.

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THE COURT NOW SUMMARIZES THE FACTS BROUGHT OUT IN TRIAL AND APPLIES THEM TO THE ELEMENTS OF AGGRAVATION WHICH WERE CONSIDERED BY THE JURY IN ARRIVING AT THEIR ADVISORY SENTENCE.

SUMMARIZATION OF AGGRAVATING ELEMENTS

A. WHETHER THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER OF WHICH HE HAS BEEN CONVICTED.

FACT:
Dougan was not under sentence of imprisonment when convicted of this murder. He had two previous criminal contempt convictions. The second murder case against him was nolle prossed after the death sentence by this Court in April, 1975.

CONCLUSION:
The two criminal contempt convictions of the defendant Dougan are aggravating circumstances without even considering the murder charge which was nolle prossed after his original sentence herein.

B. WHETHER DEFENDANT HAD PREVIOUSLY BEEN CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

FACT:
Whether Dougan's prior convictions for contempt of court was for disobedience of a Court order -

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or for some act of violent disobedience or contempt in or out of Court is not known at this time.

CONCLUSION:

As to defendant this is more an aggravating than mitigating circumstance.

C. WHETHER, IN COMMITTING THE MURDER OF WHICH HE HAS BEEN CONVICTED, THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

FACT:

The testimony and evidence showed that Dougan and the other three defendants drove around various areas of the City looking for a victim or victims - thus potentially exposing numbers of people to a great risk of death. On at least two occasions the defendants parked their car - and cased areas where they had chosen potential victims - but were thwarted by the circumstances that fortuitously existed. Thus five persons were saved from their fatal plan. If was not out of concern for the lives of many persons that only a single victim was chosen, but rather out of concern for their own detection and capture.

The note written by Dougan and left on the dead body of their victim and the tapes - made by Dougan and others - which were sent to the media, were a declaration of war by

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the murderers against white people. It was a call for others to join in their homicidal schemes and it was a call for revolution and racial war. The messages said "white people prepare yourself to die". If they only meant the white people of Jacksonville - that would mean roughly seventy percent of more than half a million people.

Dougan and the other defendants did, in fact, knowingly create a great risk of death to many persons. The extent of that danger - had they been successful to any degree - boggles the mind by contemplating the monstrous consequences.

CONCLUSION:

There is an aggravating circumstance here because not only did he and other defendants murder Stephen Anthony Orlando - they also created a great risk of death to others, before, during and after the murder.

D. WHETHER THE MURDER OF WHICH DEFENDANT WAS CONVICTED WAS COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

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FACT:

After the hitchhiking victim was picked up by the defendants, they refused to take him to a place which he requested. Instead they would not let him out of the car and drove him to a trash dump where he was murdered. The only element of this paragraph which has any meaning to the present case is the element of kidnapping. Although defendants were only charged with murder - all of the elements of kidnapping or false imprisonment were certainly present in this case.

CONCLUSION:

There is an aggravating circumstance as to the defendant under this paragraph.

E. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

CONCLUSION:

This paragraph does not seem to apply to the present case.

F. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR PECUNIARY GAIN.

CONCLUSION:

This paragraph does not seem to apply to the present case.

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G. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF THE LAWS.

FACT:

More than any other factor, this paragraph together with the racial hatred murder - seems to ha' been one of the primary motives for the murder. The stalking of an innocent victim and slaughtering him only because he was of a different race than his murderers and then using a knife to stick the note, written by Dougan, into his body - which note read:

> "Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. We must destroy our enemy therefore you must die. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free."

This was a call to revolution. The tapes made by Dougan and the others and sent to the media was a further and more violent call for a race war and for revolution. Typical excerpts of the tapes are as follows on the next two pages.

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"To the oppressive state: This is directed to enemy Mary Ann Mallory, Lt. E. A. Orlando (the victim's mother and father) and especially pig Garrett. Stephen A. Orlando was not murdered; he was executed and made to pay for the political crimes that have been perpetrated upon black people. No longer will your crimes go unpunished. A revolution has begun and you are the enemy.

"You white racist Americans, because your nature is that of a white devil, you can never do right. So the black man's freedom depends upon your defeat or your death. The revolution will end only when you are dead or when black people are free.

"Mary Ann Mallory, you should be proud that your son, Stephen, was the first to die for our black cause. Many more will follow him until we are free. I know that pig Garrett did not want to publicize the contents of the execution note found on Stephen's dead body, but he knows that revolution is very serious. He should be alarmed for now he knows that he and people like him will have to pay for their crimes. Black people have given us support in what we are doing because you will not listen to nothing (sic) else but that which comes from the barrel of a gun.

"The reason Stephen was only shot twice in the head was because the gun jammed. He was stabbed in the back, chest and the stomach to symbolize the 400 years of hangings, castrations, brutalities and rapings of my black people. He begged, oh yes, he begged for mercy as did my people when you murdered them, and we gave him no mercy, that's right, no mercy, for every time I pulled trigger, every time I saw the knife go inside his body, satisfaction came unto me because I knew, I knew, that the people who died because of him, because of his ancestors and because of you were now being repaid.

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"Remember, white racist America, this could happen to you also as long as black people are oppressed. We as black people are no longer begging anymore. Even we will take what is ours, what is rightly ours. We created it so we should have it. The Black Liberation Army will destroy you. They will destroy everything that stands in the way of the black man's freedom. To all my black people, black warriors have emerged on the scene to show you to the way to freedom and the destruction of our enemy, the white man. White people, prepare yourself to die. From your Black Liberation Army."

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FACT:

The messages and actions of Dougan and the other defendants were, in all ways, a call to disrupt and hinder the lawful exercise of governmental functions and the enforcement of the laws. It was a call to destroy our government and its laws by violent racial revolution.

CONCLUSION:

This is an aggravating circumstance as to the defendant Dougan.

H. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

FACT:

The defendant Dougan, together with the other defendants, premeditatedly and deliberately stalked their victim and brutally murdered him.

The victim's only crime was that he was of a different racial group than his murderers. He in no way offended them - except by being white - nor did he even know them before that fatal evening.

The victim, Stephen Anthony Orlando, was knocked to the ground and repeatedly stabbed

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by Barclay as he writhed in pain begging for mercy. Then Dougan shot him twice in the head at close range.

In addition to an unprovoked, premeditated murder - it was a declaration of war against a racial group - with the promise of more violence, death and revolution to come.

Such acts of Dougan and the other defendants were of the basest, most callous homicidal type and shriek out for the severest punishment and the termination of the existence of the perpetrator.

CONCLUSION:

That the murder of which the defendant Dougan was convicted was especially heinous, atrocious and cruel.

COMMENT

That the defendant Dougan did not present any matters in his responses to the PSI which mitigated the heinous, atrocious and cruel nature of this crime.

That the passage of more than four and one half years from the date of this murder until the date of this sentence - has not diminished the nature of this crime. Stephen Anthony Orlando was murdered and the facts of the crime and the call for bloodshed and revolution are the same.

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CONCLUSION OF THE COURT

THERE ARE SUFFICIENT AND GREAT AGGRAVATING CIRCUMSTANCES WHICH EXIST TO JUSTIFY THE SENTENCE OF DEATH AS TO THE DEFENDANT JACOB JOHN DOUGAN.

AUTHORITY FOR SENTENCE

That under Florida Law the Judge sentences a defendant, convicted of Murder in the First Degree, either to death or life imprisonment. This is an awesome burden to be placed upon the Judge - but in the landmark Florida case of State v. Dixon, 283 So.2d I, the Florida Supreme Court said that when such discretion can "be shown to be reasonable and controlled, rather than capricious and discriminatory, then it meets the test of Furman v. Georgia, 408, U.S. 238.

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COMMENTS OF JUDGE

My twenty-seven years of legal experience have been almost exclusively in the field of Criminal Law. I have been a defense attorney in criminal cases, an Advisor to the Public Defender's Office, a Prosecutor for eight and one-half years and a Criminal Court and Circuit Court Judge - Felony Division - for almost ten years. During these twenty-seven years I have defended, prosecuted and held trial in almost every type of serious crime.

Because of this extensive experience, I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.

My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. I, like so many American Combat Infantry Soldiers, walked the battle fields of Europe and saw the thousands of dead American and German soldiers and I witnessed the concentration camps where innocent civilians and children were murdered in a war of racial and religious extermination.

To attempt to initiate such a race war in this country is too horrible to contemplate for both our black and white citizens. Such an attempt must be dealt with by just and swift legal process and when justified by a Jury verdict of guilty - then to terminate and remove permanently from society those who would choose to initiate this diabolical course.

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HAD THE DEFENDANT BEEN EXPOSED TO THE CARNAGE OF THE BATTLEFIELDS AND THE HORRORS OF THE CONCENTRATION CAMPS INSTEAD OF MOVIES, TELEVISION PROGRAMS AND REVOLUTIONARY TRACTS GLORIFYING VIOLENCE AND RACIAL STRIFE - THEN PERHAPS HIS THOUGHTS AND ACTIONS WOULD HAVE TAKEN A LESS VIOLENT COURSE.

Having set forth my personal experiences above, it is understandable that I am not easily shocked or moved by tragedy - but this present murder and call for racial war is especially shocking and meets every definition of heinous, atrocious and cruel. The perpetrator thereby forfeits further right to life - for certainly his life is no more sacred than that of the innocent eighteen year old victim, Stephen Anthony Orlando.

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SENTENCE

Having adjudged Jacob John Dougan guilty of Murder in the First Degree, I hereby sentence you to death. I order that you be taken by the proper authorities to the Florida State Prison and there kept in close confinement until the date of your execution be set.

That on such day, as set, you be put to death by having electrical currents passed through your body in such amounts and frequency until you are rendered dead.

I advise you that you have thirty days from today to take an appeal from the sentence which I have just imposed upon you and I hereby appoint the Public Defender's Office to represent you on such appeals.

May God have mercy upon your soul.

DONE AND ORDERED AND SENTENCED in Open Court, at the Duval County Courthouse, Jacksonville, Florida, on this 25th day of October, 1979.

R. Hudson Olliff

R. HUDSON OLLIFF - CIRCUIT COURT JUDGE

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Fla. Stat. §782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premediated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.

(b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

Fla. Stat. §921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty -- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United Sates or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.-- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) which outweigh the aggravating circumstances found to exist; and
(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death. --Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitiagting circumstacnes, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
(b) That there are insufficient mitigating circumstances as enumerated in subsection (6) to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentence proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) Review of judgment and sentence.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.
(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
(c) The defendant knowingly created a great risk of death to many persons.
(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuniary gain.
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

Appendix D, p. 2

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Fla. Stat. §38.23 Contempts defined

A refusal to obey any legal order, mandate or decree, made or given by any judge either in term time or in vacation relative to any of the business of said court, after due notice thereof, shall be considered a contempt, and punished accordingly. But nothing said or written, or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt.

Fla. Stat. §900.04 Contempts

Said courts, in the exercise of their criminal jurisdiction may punish for contempts as in the exercise of their civil jurisdiction, and the criminal courts of record shall possess, in this respect, the same powers as the circuit courts.

Rule 3.230 Disqualification of Judge

(a) The State or the defendant may move to disqualify the judge assigned to try the cause on the grounds: that the judge is prejudiced against the movant or in favor of the adverse party; that the defendant is related to the said judge by consanguinity or affinity within the third degree; or that said judge is related to an attorney or counselor of record of the defendant or the state by consanguinity or affinity within the third degree; or that said judge is a material witness for or against one of the parties to said cause.

(b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.

(c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.

(d) The judge presiding shall examine the motion and supporting affidavits to disqualify him for prejudice to determine their legal sufficiency only, but shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed no further therein. Another judge shall be designated in a manner prescribed by applicable laws or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.

(e) When the prosecuting attorney or defendant shall have suggested the disqualification of a trial judge and an order shall have been made admitting the disqualification of such judge, and another judge shall have been assigned to act in lieu of the judge so held to be disqualified the judge so assigned shall not be disqualified on account of alleged prejudice against the party making the motion in the first instance, or in favor of the adverse party, unless such judge shall admit and hold that it is then a fact that he, the said judge, does not stand fair and impartial between the parties and if such judge shall hold, rule and adjudge that he does stand fair and impartial as between the parties and their respective interest, he shall cause such ruling to be entered on the minutes of the court, and shall proceed to preside as judge in the pending cause. The ruling of such judge may be reviewed by the appellate court, as are other rulings of the trial court.

No. 80-6949

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

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JACOB JOHN DOUGAN, JR.,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

_____/

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 80-6949

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

JACOB JOHN DOUGAN, JR.,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

_____/

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 398 So.2d 439 (Fla. 1981).

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, § 1257(3), or any other provision thereof, at least for the purpose of determining whether to decline assumption thereof.

QUESTIONS PRESENTED

I

WHETHER PETITIONER'S DEATH SENTENCE WAS IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE DEATH SENTENCE WAS BASED IN PART ON THE AGGRAVATING CIRCUMSTANCES ENUMERATED IN FLA.STAT. § 921.141 (5)(a and b) AND THESE AGGRAVATING CIRCUMSTANCES FACTUALLY DID NOT EXIST.

II

WHETHER PETITIONER'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS DETAILED IN THIS COURT'S DECISION IN LOCKETT v. OHIO, 438 U.S. 586 (1978), WHERE THE TRIAL COURT AT A RESENTENCE HEARING ALLEGEDLY REFUSED TO EVEN CONSIDER SUBSTANTIAL APPLICABLE MITIGATING CIRCUMSTANCES PRESENTED BY PETITIONER.

III

WHETHER PETITIONER WAS DENIED HIS RIGHT TO A FAIR RESENTENCING PROCEEDING BEFORE A NEUTRAL AND DETACHED JUDGE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE JUDGE DECIDED THE ISSUE OF HIS OWN DISQUALIFICATION; AND REFUSED TO DISQUALIFY HIMSELF AFTER THE PETITIONER HAD MOVED TO DISQUALIFY THE JUDGE FOR BIAS AND PREJUDICE.

STATEMENT OF THE CASE

In March 1975, Petitioner, Jacob Dougan, was convicted and sentenced to death for the first degree murder of Stephen Orlando following a recommendation of death by the jury. The judgment and sentence were affirmed by the Supreme Court of Florida following a full and careful review of the record and written findings of the trial court in support of sentence. Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978). On March 22, 1977, this Court determined that a trial court violated a defendant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it imposed a sentence of death after considering matters in a presentence investigation report without affording the defendant the opportunity to explain or rebut those matters. Gardner v. Florida, 430 U.S. 349 (1977). Following Gardner, the Supreme Court of Florida took it upon itself to order each court which had sentenced a defendant to death to inform the court whether it had done so in violation of Gardner. In response to that order, issued on May 6, 1977, the court which had sentenced

petitioner to death stated that petitioner had been made fully aware of all matters considered by the court in sentencing. In an abundance of caution, however, the Supreme Court of Florida ordered the sentencing court to hold a hearing for the sole purpose of allowing petitioner to explain or rebut matters contained in the presentence investigation report which had been prepared in his case. Barclay v. State, 362 So.2d 657 (Fla. 1978).

Following that hearing the sentencing court reimposed the original sentence of death and the Supreme Court of Florida affirmed. Dougan v. State, 398 So.2d 439 (Fla. 1981). It is from this holding that the instant petition arises.

ARGUMENT

I

WHETHER PETITIONER'S DEATH SENTENCE WAS IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE DEATH SENTENCE WAS BASED IN PART ON THE AGGRAVATING CIRCUMSTANCES ENUMERATED IN FLA.STAT. § 921.141 (5)(a and b) AND THESE AGGRAVATING CIRCUMSTANCES FACTUALLY DID NOT EXIST.

On August 21-23, 1979, a full plenary hearing was held in response to the order issued in Barclay, 362 So.2d 657. The order limited the scope and purpose of the hearing as follows:

> To assure that the sentencing procedure in this case satisfies the constitutional command of the Due Process Clause, the death sentences are vacated and the cause is remanded to the trial court. The court is directed to provide a hearing at which the defense has the opportunity to rebut any of the information contained in the presentence investigation reports, whether in the confidential portion of the report or any other part. This direction, of course, requires that the defense have access to the reports-in-full with sufficient time before the hearing to prepare rebuttal. Following the hearing the court is to impose

> sentences. If death is imposed as to either appellant there will be available in this Court review, limited to matters related to compliance with this order. [Emphasis added.]

362 So.2d at 658.

Temporary jurisdiction was thus relinquished for the sole purpose of affording petitioner an opportunity to respond to the presentence investigation report that had been used at his initial sentencing. That was done herein. The trial court in an abundance of caution allowed extraneous testimony of twenty-six witnesses on behalf of petitioner to be heard at the hearing. Nonetheless, at the conclusion of the hearing, the trial court, having heard nothing to merit relief via Gardner or in mitigation of sentence, reimposed the death sentence which had been vacated.

As a general rebuttal to the issues raised by petitioner on appeal to the Supreme Court of Florida, respondent successfully argued to that court that it should limit its review to a determination of whether petitioner had presented any evidence at the hearing that would justify a finding that the sentence of death was inappropriate. Respondent contended, and repeats the contention here, that petitioner presented no evidence whatsoever in explanation of or rebuttal to the presentence investigation report but, rather, had merely presented testimony in mitigation of sentence wholly outside the limited scope of the hearing. Furthermore, the courts below agreed that the testimony presented failed to justify any conclusion other than that originally reached in sentencing petitioner to death. Dougan, 398 So.2d, at 440-441.

The extent to which petitioner failed to understand or appreciate the limited scope of the Gardner relief he was afforded was best expresed by the court as follows:

> Counsel for Dougan filed multiple motions during the course of the Gardner remand proceeding, not one of which was directed to the mandate we had issued. Treating the remand as an opportunity to revisit the constitutionality of the death penalty, the bias of the trial judge, the impropriety of articulated aggravating circumstances found in the original sentencing order, and a range of other matters unrelated to our directive, Dougan's counsel endeavored to treat the remand as a full-blown sentencing proceeding. The trial judge properly rejected counsel's attempt to expand the proceeding. Songer v. State, 365 So.2d 696 (Fla.1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979).
>
> Our vacation of Dougan's death sentence for Gardner relief was technically based, serving the sole purpose of allowing Dougan's counsel to demonstrate that matters contained in the pre-sentence investigation report were improper and prejudicial. Dougan has now had that opportunity, and from the record he has failed to show that any information contained in the pre-sentence investigation report was in any way erroneous, misleading or prejudicial.

Id. at 440.

The defendant in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), had similarly contended that the Gardner relief order in his case had had the effect of entitling him to a new sentencing hearing, complete with jury. The Supreme Court of Florida held that the lower court had properly rejected Songer's attempts to expand the hearing beyond the limited scope envisioned by this Court in Gardner. In fact, the court upheld the lower court's refusal to permit Songer to offer evidence in mitigation of sentence since it "was not relevant at the hearing on remand. That hearing was only for the purpose of allowing the defendant an opportunity to rebut what was contained in the presentence investigation report." Id. at 699-700. Interestingly, petitioner was permitted to present the testimony of twenty-six witnesses in mitigation of sentence and was thus afforded a benefit to which he was not entitled. The

failure of either the sentencing court or the Supreme Court of Florida to have been persuaded by such testimony to reduce the sentence imposed cannot be said to constitute error warranting review by this court. A review of that testimony reveals prejudices which were properly taken into account in the courts' review of its credibility.

More particularly, petitioner urges that this Court should review the reimposition of his sentence of death because of alleged defects in the sentencing court's finding of statutory aggravating circumstances.[1] Again petitioner fails to understand the nature of the proceedings below. The fact is that the written findings of the sentencing court on reimposition of sentence are virtually identical to the original findings made at the court's initial imposition of the sentence of death. The primary difference is that the new findings take into account the testimony presented by petitioner at the hearing below.[2] This is important because the Supreme Court of Florida in its review of the original imposition of sentence rejected, as applicable to petitioner, the two aggravating circumstances which serve as the basis for petitioner's initial point. Barclay, 343 So.2d, at 1271 fn. 3. Nonetheless, the court found that four other aggravating circumstances (which also appear in the second findings in support of sentence) were "well documented in the

---

[1] Petitioner maintains that it was error for the sentencing court to have found the existence of the aggravating circumstances set forth in s. 921.141(5)(a), F.S. ("The capital felony was committed by a person under sentence of imprisonment") and s. 921.141(5)(b) ("The defendant was previously convicted of another felony involving the use or threat of violence to the person.")

[2] A more thorough discussion of the extent to which petitioner is in error in suggesting that the sentencing court failed to consider the testimony presented at the hearing is contained in our response to petitioner's second point.

record before us."[3] Id. Surely petitioner would not suggest that the Supreme Court of Florida, in its review of death penalty cases, is not free to reject the applicability of aggravating circumstances and yet, on balance, find the existence of sufficient outweighing aggravating circumstances to warrant an affirmance of the penalty imposed. See, for example, Cooper v. State, 336 So.2d 1133 (Fla. 1976), wherein the court found the death penalty appropriate even though the killing was not especially heinous, atrocious or cruel as the sentencing court had found it to be.

Again, the procedural protection afforded petitioner by the Supreme Court of Florida following this Court's decision in Gardner did not wipe the slate clean, as petitioner would contend, thus requiring a full sentencing hearing and review thereof. Rather, at the conclusion of the hearing below and reimposition of sentence, petitioner was in the same status he held prior to the hearing, except that prior to the hearing there was some question whether petitioner's rights under Gardner had been violated, and after the hearing there was none. It was thus the duty of the Supreme Court of Florida to determine whether any information in the presentence investigation report was erroneous, misleading, or prejudicial. The court properly concluded:

> We now hold that Dougan was not prejudiced by the trial court's early consideration of a pre-sentence investigation report which his counsel originally had no opportunity to rebut, that the original findings of the trial court were not tainted or otherwise rendered invalid by the pre-sentence investigation report, and that the reimposition of a death penalty was proper. We affirm the sentence imposed by the trial judge.

---

[3] These circumstances are as set forth in s. 921.141(c) ("The defendant knowingly created a great risk of death to many persons"); (5)(d) ("The capital felony was committed while the defendant was engaged...in the commission of... [a] kidnapping..."); (5)(g) ("The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws"); and (5)(h) ("The capital felony was especially heinous, atrocious, or cruel").

Id. at 440-441.

Finally, while not necessary to the disposition of the appeal before it, the Supreme Court of Florida specifically noted that it had reviewed the contentions made by petitioner, some of which are included in the instant petition. Dougan, 398 So.2d, at 441 fn. 2. Thus, petitioner's contention to the contrary is simply not true. Accordingly, petitioner has presented nothing that would warrant further review by this Court.

II

WHETHER PETITIONER'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS DETAILED IN THIS COURT'S DECISION IN LOCKETT v. OHIO, 438 U.S. 586 (1978), WHERE THE TRIAL COURT AT A RESENTENCE HEARING ALLEGEDLY REFUSED TO EVEN CONSIDER SUBSTANTIAL APPLICABLE MITIGATING CIRCUMSTANCES PRESENTED BY PETITIONER.

Petitioner is simply incorrect in his assertions of error warranting further review by this Court and thus has afforded this Court no justification for the granting of the relief sought.

Initially, petitioner states that the sentencing judge refused to find the existence of the mitigating circumstance set forth in s. 921.141(6)(a), F.S. ("The defendant has no significant history of prior criminal activity"). In truth, the sentencing judge stated that this was "neither an aggravating or mitigating circumstance as to the defendant Dougan because the facts of the contempt of court are not known at this time." (Petitioner's Appendix C, at p. 17). The Florida Supreme Court has ruled that even if there is evidence of the existence of a mitigating circumstance, the jury or judge reviewing such evidence is not required to find the existence of the circumstance but is, rather, free to weigh the sufficiency of that evidence and its credibility in determining whether there is

a sufficient basis for finding such existence in favor of the defendant. Hargrave v. State, 366 So.2d 1 (Fla. 1978). Nonetheless, even if the sentencing judge should have found the existence of this mitigating circumstance, his failure to do so does not constitute error of constitutional dimension warranting review by this Court. A review of the aggravating and mitigating circumstances found to exist by the sentencing court and by the Florida Supreme Court in its initial review of the sentence imposed clearly reveals that, on balance, the sentence of death was appropriate. Barclay v. State, 343 So.2d 1266 (Fla. 1977); Dougan v. State, 398 So.2d 439 (Fla. 1981); petitioner's Appendix C.

Petitioner next suggests the applicability of the mitigating circumstance set forth in s. 921.141(6)(g), F.S. ("The age of the defendant at the time of the crime"). Petitioner was 27 years of age when he murdered Stephen Orlando because the latter had the misfortune of being white. It was entirely proper for the sentencing judge and the Florida Supreme Court to refuse to find that petitioner's age mitigated the appropriateness of the sentence of death. Similarly, the Florida Supreme Court has upheld a trial court's refusal to consider a twenty-one year old defendant's youth as a mitigating circumstance. Meeks v. State, 339 So.2d 186 (Fla. 1976). It was properly within the authority of the courts below to determine that petitioner's age did not justify a finding of the existence of the statutory mitigating circumstance being discussed.

Finally, petitioner contends that the sentencing judge refused to consider mitigating circumstances other than those enumerated in the statute. This is simply not true. Prior to reviewing the evidence presented at the hearing below for the purpose of setting forth in writing his reasons for reimposing the sentence of death, the sentencing judge stated: "Before

imposing sentence for Murder in the First Degree, this Judge has considered those matters brought out by the defendant, Mr. Dougan, in his responses to the PSI." (Petitioner's Appendix C, at p. 16) (emphasis added). Further evidence of this can be found in the judge's written findings.

For example, in rejecting the existence of the mitigating circumstance set forth in s. 921.141(6)(e), F.S. ("The defendant acted under extreme duress or under the substantial domination of another person"), the sentencing judge stated: "That at the responses to the pre-sentence report, approximately twenty-six persons spoke in behalf of Dougan. The consistent theme of their testimony was that he was active in a number of organizations in leadership capacity; that he was a doer, a mover and a leader." (Petitioner's Appendix C, at p. 20.) Additional reference to this evidence can be found at pp. 21, 22 of such appendix. Significantly, and in direct refutation of petitioner's contention that the sentencing judge had ignored his military record, the findings reflect petitioner's service in the military. (Petitioner's Appendix C, at p. 22.)

It is thus clear from the record that the sentencing judge reviewed the evidence presented at the hearing below but that he failed to find that it warranted imposition of a sentence of life imprisonment. Accordingly, petitioner's second contention is shown to be without merit.

III

WHETHER PETITIONER WAS DENIED HIS RIGHT TO A FAIR RESENTENCING PROCEEDING BEFORE A NEUTRAL AND DETACHED JUDGE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE JUDGE DECIDED THE ISSUE OF HIS OWN DISQUALIFICATION AND REFUSED TO DISQUALIFY HIMSELF AFTER THE PETITIONER HAD MOVED TO DISQUALIFY THE JUDGE FOR BIAS AND PREJUDICE.

Respondent rejects petitioner's contention that Judge Olliff should have recused himself and submits that the record

reveals a conscious attempt on petitioner's part to induce error which would result in such recusal as a means of obtaining a new judge. Moreover, the reasons stated in support of his motion are legally insufficient.

Case law over the years has amplified the provisions of Fla.Cr.P.R. 3.230(d) and § 38.10, F.S., in order for Florida trial courts to have certain guidelines to follow. For example, case law holds that a person seeking to disqualify a judge must show that his fear of bias is well-founded and not fanciful or frivolous and that it is supported in substance. Murray v. Caro, 17 So.2d 79 (Fla. 1944). This is only reasonable in that it would be very easy for a defendant to secure false affidavits from relatives, etc., who would be prone to succumbing to the temptations of fabricating an affidavit in order to help out their kin. Likewise, an overzealous attorney could do the same.

Case law in Florida also holds that a judge may deny a motion for recusal where the affidavits are legally insufficient. In order to do so, a judge is entitled to determine whether the affidavits meet the requirements of the applicable law. State ex rel. Jensen v. Cannon, 163 So.2d 535 (Fla.3d DCA 1964). Several cases hold that adverse judicial rulings are insufficient to demonstrate prejudice. Wilson v. Renfroe, 91 So.2d 857 (Fla. 1957); Suarez v. State, 115 So. 519 (Fla. 1928); State ex rel. Locke v. Sandler, 23 So.2d 276 (Fla. 1945). Overall, a trial court must examine the affidavits and determine the question of legal sufficiency--exactly what the trial court did.

1. The grounds alleged by petitioner to justify recusal are legally insufficient. It is ludicrous for petitioner to contend that because at the conclusion of the hearing the sentencing judge was shocked by the cruel and senseless murder that this makes him biased. Petitioner raised this issue in his original appeal to the Florida Supreme Court and it was found by

that court to be so inconsequential that it wasn't mentioned in the court's opinion. Barclay, supra, at 1266. Certainly, it was proper for the trial judge, when he originally sentenced petitioner to death and when he reimposed that sentence, to comment upon the horrible manner in which petitioner selectively murdered Stephen Orlando solely because of his race as a means of stirring up racial hatred and causing a race war. It cannot be reasonably urged that the Florida Supreme Court in adopting the trial judge's findings and commending him for his painstaking analysis thereby demonstrated a prejudice against petitioner. Something else--the sentencing judge's comparison in his original sentencing order of the racial hatred of petitioner to one with which he was familiar is not an indictment of the sentencing judge, but rather, of petitioner himself.

2. Lest there be any doubt as to petitioner's intentions at the hearing below, they are here clearly revealed. The record plainly shows that petitioner, aware that the trial court was restricted to a review of the motion and supporting affidavits for a determination of the legal sufficiency, attempted to lead the trial court into error which would have necessitated his recusal by requesting that the judge take the stand to explain his membership in three national organizations alleged to exclude blacks from their membership. It is well settled in Florida that an attorney cannot provide an incident rendering the judge disqualified to proceed with the case. State v. Himes, 36 So.2d 433 (Fla. 1948). Petitioner's reprehensible conduct in attempting to induce error should not be countenanced, much less rewarded, by this Court.

Moreover, respondent rejects petitioner's contention that the sentencing judge displayed a racial bias by referring to race in his resentencing order. It requires only cursory review of the order to see that race was an issue only because petitioner

chose for it to be. It was petitioner who brutally murdered Stephen Orlando because he was white and it was petitioner who attempted to instigate a race war!

3. Unlike Bundy v. Rudd, 366 So.2d 440 (Fla. 1978), upon which petitioner has modeled and molded his argument, the record sub judice does not clearly reveal the basis for the argument. The only mention in the record of alleged ex parte communications appears at R Vol.II, pp. 87-94, 96 and obviously refers to communications made during petitioner's trial in 1975. Respondent submits that while any such communications would be irrelevant to the hearing held four years later, we note the following statement of the trial court in rejecting petitioner's contention below:

> The motion filed by Mr. Nursey to disqualify the Judge for the reasons they have previously stated about in talking with the Attorney General's Office, which as their pleading shows was made known to the counsel for both sides in an effort to learn the status of the law, and which was not made a basis for error on any appeal that they took, and my opinion is not sufficient for this Court to disqualify itself.

(R Vol.II, p. 96) Respondent finds nothing in Bundy to suggest that the trial court's opinion is in error.

4. Petitioner's next assertion can only be described as frivolous. It is asserted that in wholly unrelated cases the trial court may have engaged in ex parte communications indicative of a prosecutorial attitude. Frankly, such a contention is so remote that it constitutes nothing more than a general allegation of prejudice. This is wholly insufficient to warrant recusal. State ex rel. Aguiar v. Chappell, 344 So.2d 925, 926 (Fla. 3d DCA 1977).

5. In its initial review of the sentence imposed upon petitioner, the Supreme Court of Florida commended the trial

court for conducting the full and proper analysis required by law for sentencing in a capital case. Please note the following:

> The judge before whom these cases were tried meticulously identified in writing each aggravating and mitigating circumstance listed in the death penalty statute, and he commented with specifity as to the relevance and weight to be accorded each.

Barclay, 343 So.2d, at 1270.

There is nothing in the record to suggest that the lower court did any less on resentencing. The sentencing court's rejection of the testimony presented at the hearing below for purposes of mitigation of sentence was entirely justified. It is unnecessary to undertake an extensive review of this trial judge's actions in other capital cases. But it should be emphasized that regardless of whether this judge has rejected advisory recommendations of a sentencing jury in other cases, the jury sub judice recommended that petitioner be sentenced to death. Furthermore, the Supreme Court of Florida noted this particular judge's experience in Dobbert v. Florida, 375 So.2d 1069, 1071 (Fla. 1979). This Court had similar praise for this particular judge in its review of Dobbert v. Florida, 432 U.S. 282 (1977). The imposition of the death sentence is an arduous burden placed upon the judiciary and, in particular, upon sentencing courts. In imposing such a sentence, a judge who calls upon his experiences in weighing the evidence before him cannot be faulted for doing so as long as his ultimate decision is fair and fully supported by the record. The Supreme Court of Florida has now twice determined that the sentence was appropriate. Nothing suggested by petitioner in his final point can disturb the appropriateness and correctness of that determination.

CONCLUSION

The petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief for Respondent in Opposition to Mr. Joseph M. Nursey, 15 Peachtree St., N.E., Ste. 831, Atlanta, Georgia 30303, by U.S. mail, this 25th day of August 1981.

Wallace E. Allbritton
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